BN 2016/2013: April 2016

# Burma/Myanmar: SIGNIFICANT REFORMS NEEDED BEFORE HUMAN RIGHTS Due diligence POSSIBLE

**Burma/Myanmar has a legacy of human rights violations linked to foreign investment and land acquisition for business activities, including large-scale development projects. A flawed and outdated legal framework, poor policy coherence, weak governance, rule of law deficiencies, and an exploitative and predatory approach to controlling natural resources have fuelled human rights violations and armed conflict.**

**Despite a new government, ongoing military control and/or influence over key ministries remains a barrier to land reform. The legal framework for land acquisition violates international standards. Institutionalized impunity and discrimination, a lack of transparency, and corrupt and unregulated industries present a significant risk to local residents, as well as local and foreign investors.**

**As foreign direct investment increases in Burma, it is crucial that the new National League for Democracy (NLD)-led government tackles land acquisition as a priority policy issue. The current legal and policy framework must be significantly reformed to ensure transparent investment practices and that human rights are respected by businesses operating in the country. Such measures should be conflict-sensitive, clearly address the impact of past abuses and provide concrete means to protect human rights.**

**Unfair land laws and military power**

* The existing legal framework in Burma/Myanmar gives the state the ability to confiscate land for development projects, while provisions on compensation for landowners are largely ignored [see textbox *Laws that Support Land Confiscation*].[[1]](#footnote-1) **The 2008 military-drafted Constitution identifies the state as the ultimate owner of all land**, and Amnesty International has described the situation in Burma as a “perfect storm” of rich natural resources and a weak regulatory framework.[[2]](#footnote-2)
* A clear obstacle to the transformation of land acquisition practices in Burma is the **Tatmadaw’s control of the Home Affairs and Border Affairs Ministries** (in addition to the Defense Ministry). Control of the Home Affairs Ministry gives the military authority over the police and decisions to prosecute, which may make it difficult for the government to address political charges that have increasingly targeted land rights activists and protestors demanding remedy. The Tatmadaw also controls the powerful General Administrative Department (GAD), which has significant power over government administration at the state and regional level – the GAD has been described as “potentially so powerful that its very character will really determine the extent to which Myanmar’s bureaucracy is ‘democratized’ or ‘reformed.’”[[3]](#footnote-3) The GAD’s duties range from tax collection to land management and registration processes, including rules on compensation.[[4]](#footnote-4)
* **Decisions on natural resources, particularly mining licenses, remain highly centralized.** A new Mining Law enacted in December 2015was meant to increase the authority of states/divisions to oversee the rollout of mining projects in local areas; however the national level Mines Ministry still has power over final approval.[[5]](#footnote-5) The new law also expands foreign investment to allow partnerships with small and medium-scale mining companies, as well as profit sharing or equity participation agreements with the government.[[6]](#footnote-6) In February, the Mines Ministry began consultations on amended by-laws to be enacted alongside the new law, to clarify these provisions.[[7]](#footnote-7) The by-laws will be finalized under the new government.[[8]](#footnote-8)

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| **Laws that Support Land Confiscation****The Land Acquisition Act (1894):** Has until recently been the main legal justification used by the state to confiscate land, including vague “public purposes.” The Act has provisions for appropriate land acquisition procedures including compensation, but these have usually been disregarded. A sister law, the **Land Acquisition (Mines) Act (1895)**, applies to cases involving minerals or mines.[[9]](#footnote-9)**Constitution of the Republic of the Union of Myanmar (2008):** Article 37 of the constitution identifies the state as being the ultimate owner of all land and natural resources in Burma, giving it the right to forcibly acquire land.[[10]](#footnote-10)**Special Economic Zone Law (2011):** Places responsibility on investor/developer to relocate or compensate those whose lands are taken, grants land leases for up to 30 years with two possible renewals of 15 years thereafter.[[11]](#footnote-11)**Foreign Investment Law (2012):** Allows the Myanmar Investment Commission (MIC) to designate the minimum amount of investment capital for foreign businesses. Foreign investment is restricted in 11 areas, including agriculture, livestock breeding, and fishing sectors. However, foreign investors can form a joint venture with a Burmese counter-part. Foreign investors can be allowed into restricted sectors in cases of national interest, can lease land from the state or from authorized private owners for up to 50 years with possible extension up to 70 years.[[12]](#footnote-12) This law has been seen as a motivator for local cronies to seize land.**Vacant, Fallow and Virgin Lands Management Law (2012)**: Gives the State the authority to designate a piece of land as vacant, fallow, or virgin, which greatly affects villagers and communities who (often lacking the means to formally register their land) set aside land on a seasonal basis. Such designated land can be used for foreign investment with the agreement of the MIC. This law also allows authorities to seize back land if natural resources are found within the plot or if it is “in the interest of the State.”[[13]](#footnote-13)**Farmland Law (2012)**: Legalizes land confiscation for activities ranging from the construction of factories, power lines, roads, railways, pipelines, amusement parks, to any other project that the authorities deem to be of “national interest.” The law also limits farmers’ access to judicial remedy by stipulating that newly created agencies under the Agriculture and Irrigation Ministry will have jurisdiction over land-related disputes ahead of the courts.[[14]](#footnote-14) |

* **A new National Land Use Policy (NLUP) released in January 2016 could catalyze a more human rights and people-centered approach to investment and land tenure**, but must first be adopted by the new NLD government.[[15]](#footnote-15) The NLUP is intended to frame the development of a National Land Law as well as the harmonization of existing land-related laws[[16]](#footnote-16). The policy sets out a sound basis for land reform, and refers specifically to human rights standards in its basic principles.[[17]](#footnote-17) Noteworthy principles in the NLUP also include the need to legally recognize and protect customary land tenure, to ensure equality between men and women over land resources, and the need to provide correct and accurate land information, as well as for inclusive and transparent processes for the planning and drawing of land maps.[[18]](#footnote-18)
* The NLUP requires the development and implementation of participatory, transparent and accountable processes related to land use and land management, as well as of fair procedures relating to restitution, and reclaiming land tenure and housing rights of IDPs and returning refugees.[[19]](#footnote-19) Importantly, the policy also provides that public interest should be prioritized over private companies in land use decision-making.[[20]](#footnote-20) The allocation of responsibilities and of legal accountability among the new bodies created under the NLUP[[21]](#footnote-21) and the various current committees in charge of implementing land-related laws remains unclear.[[22]](#footnote-22) It is crucial that the draft Myanmar Investment Law, which is expected to be passed in 2016, does not grant investor rights or protection schemes at the expense of and contradictory to the human rights-based approach to land set out in the NLUP.[[23]](#footnote-23)
* On 6 January it was reported that the NLD had begun compiling a land seizure database.[[24]](#footnote-24) On 23 February, the new NLD-dominated National Parliament approved proposals to increase oversight of state handovers of development projects during the transition, citing forced displacement and a lack of transparency.[[25]](#footnote-25) Despite a standing protest by military MPs, 68 development projects were suspended.

**Access to justice: previous government’s repression of land rights protests, compensation denied**

* **Land rights activists and farmers have frequently been targeted by authorities for their efforts to seek justice and compensation through peaceful protests**. In the year before the 8 November 2015 elections, at least three land rights activists were killed, two at the hands of police or the Tatmadaw. At least 52 land rights activists and protestors were jailed during this time, while 33 were arrested and/or charged.[[26]](#footnote-26) Arrests and imprisonments continued post-election, and of the121 political prisoners in Burma/Myanmar’s jails on 7 April, at least 25 were farmers**.**[[27]](#footnote-27)At least 41 of the 414 activists facing politically motivated charges were farmers and/or land rights activists.[[28]](#footnote-28)

A 7 April pledge by State Counselor Aung San Suu Kyi to release all political prisoners, accompanied by an initial prisoner amnesty on 8 April, brought the release of 199 activists, including:[[29]](#footnote-29)

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| **Abuses at the Letpadaung copper mine[[30]](#footnote-30)****29 November 2012:** Police used white phosphorus grenades, tear gas and incendiary devices against protestors in Salingyi Township, leaving over 100 injured, many with severe burns.**13 December 2014:** Police fired rubber bullets into a crowd of farmers at a demonstration near the mine, leaving two protestors injured**.****22 December 2014:** Police fired live ammunition at a group of 60 protestors in Hse Tae Village, Salingyi Township, fatally shooting farmer Khin Win.**23 December 2014:** Three more protestors were injured by police using rubber bullets in Hse Tae.**10 February 2015**: Police clashed with local protesters, injuring at least nine after protesters tried to stop Wanbao bulldozers from entering confiscated land. |

* Land rights activist **Su Su Nway**, arrested on 8 December in Pyin Oo Lwin Township, Mandalay Division, and charged under Article 18 of the Peaceful Assembly Law for a protest she held 18 months previously against land grabs and the torture of farmers whose land had been seized.[[31]](#footnote-31) She was previously jailed under Article 447 of the Criminal Code from July to August 2015 for meeting with farmers challenging land grabs in Nyaunglebin Township, Pegu/Bago Division.[[32]](#footnote-32)
* Land rights activist **Naw Ohn Hla**, arrested on 29 December 2014 for a protest against the fatal shooting by police of protestor Khin Win at the Letpadaung copper mine, Salingyi Township, Sagaing Division, on 22 December [see textbox *Abuses at the Letpadaung copper mine*].[[33]](#footnote-33) She was serving four years and four months in prison under Article 18 of the Peaceful Assembly Law and other provisions for that protest.[[34]](#footnote-34) No action has yet been taken against police responsible for Khin Win’s death.
* A report released by Physicians for Human Rights in 2015 found that 64% of people felt compelled to accept confiscation of their land and poor compensation from authorities due to intimidation and fear of what would happen if they refused; **evidence of a chilling effect created by the previous government’s crackdown on land rights activism, and decades of systematic human rights abuses.**[[35]](#footnote-35)

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| **How farmers have sought justice****Protests for compensation or return of land:** These are common for farmers and activists, as Burma/Myanmar’s flawed judicial system, more often used against them, presents few options for redress. Protests have in the past been met with criminal charges or violent crackdowns.**Plough protests:** A form of protest whereby famers plough seized land to show ownership. In June 2015, Meikhtila Township Court, Mandalay Division, sentenced six farmers to five months in prison under Articles 477 and 427 of the Criminal Code for a plough protest on m military-seized land. |

* **Access to justice through official complaint mechanisms and the courts is often non-existent in practice, leaving farmers with little recourse after land is taken**. Those seeking justice in expensive court proceedings are rarely successful. A parliamentary committee set up in 2013 had received around 17,000 complaints by November 2015, and of the 10,000 it had resolved by this time, less than 10% were to receive compensation or restitution of their land.[[36]](#footnote-36) The vast majority of around 6,000 complaints received by the Myanmar National Human Rights Commission (MNHRC) by 2015 related to land seizures by the government, Tatmadaw and businesses, however the MNHRC only has the power to make recommendations.[[37]](#footnote-37)

**Enforcement of favorable findings is a problem:** In August 2013, Htin Kyaw and three other land rights activists were arrested in North Okkalapa for a protest calling for authorities to enforce a court ruling that land seizures by a crony businessman were illegal.[[38]](#footnote-38)

**Extractive industries, corruption and the need for due diligence**

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| **Due diligence measures on land****H & M, the global clothing retailer, requires its Burma/Myanmar based suppliers to provide documentation to confirm legality of the land lease or purchase. Legal experts are required to analyze the land ownership history, compensation history, as well as current valuation of land and history of land valuation. The company excludes suppliers in Special Economic Zones as these have been subject to many land disputes.[[39]](#footnote-39)** |

* In November and December 2015, an estimated 284 people, mostly mine workers, died in landslides at jade mining refuse dumps in Hpakant Township, Kachin State**.** In January 2016, at least five more landslides occurred, leaving at least 26 dead and dozens trapped beneath rubble.[[40]](#footnote-40) The lack of regulation in the jade industry, which is largely controlled by crony corporations, the military elite and drug lords, was criticized by MPs and rights groups but the Mines Ministry has yet to implement changes.[[41]](#footnote-41) The jade industry was valued at more than US$31billion in 2014, 48% of Myanmar’s official GDP and 46 times government expenditure on health, while the figure for the last decade is estimated to be more than US$120 billion.[[42]](#footnote-42)

Though jade businesses are required to pay a range of fees, royalties and taxes to the Burma/Myanmar government, **a Global Witness report on corruption in the jade industry found that the state may have received under US$374 million in official jade revenues in 2014; less than 2% of the estimated value of the industry.[[43]](#footnote-43)** Without an accurate account of the actual worth of the jade industry in Burma, it remains impossible to regulate, tax and allocate revenue properly, which exacerbates conflict with ethnic groups disenfranchised from industry profits.[[44]](#footnote-44)
* In January 2016, the previous government published its first ever Extractive Industries Transparency Initiative (EITI) Report, focusing on revenue flows from the country’s oil, gas and mining sectors. **The report offered very little information on company ownership in the extractive industries in Burma or the terms of companies’ contracts, making it difficult to hold companies accountable.** Global Witness and other rights groups also criticized the report for superficial coverage of the jade industry, including failure to include previously published statistics on the jade industry, which were reported in 2015 with full cooperation of the government.[[45]](#footnote-45)
* **Institutionalized discrimination and poor labor standards pose a risk to investors** – according to a November 2015 International Trade Union Confederation report, child labor is still prevalent in many sectors and women, religious minorities and LGBT people face continued discrimination in the workplace.[[46]](#footnote-46) The passage of four Race and Religion Laws in 2015, which were spearheaded by extremist nationalist group the Organization for the Protection of Race and Religion (Ma Ba Tha), further institutionalize discrimination against Rohingya Muslims and women, and has been heavily criticized by human rights groups, however the NLD has faced threats not to repeal or amend them.[[47]](#footnote-47)
* **Voluntary regulation has not worked.** According to EarthRights International, no US company operating in Burma had ever voluntarily disclosed an environmental, social, or human rights impact assessment before the implementation of US Reporting Requirements for Responsible Investment in Burma.[[48]](#footnote-48) The organization has urged renewal of the Requirements, noting companies such as Chevron and ConocoPhillips, which only recently commenced offshore exploration activity as new oil and gas blocks continue to be discovered.
* **Investments in the absence of significant reforms may undermine the country's transition**. On 14 January, more than 571 Burmese CSOs wrote an open letter to the European Commission urging them not to sign an Investor Protection Agreement at a time when laws and policies have yet to be reformed, saying it would endanger democracy and sustainable peace.[[49]](#footnote-49)
* **As foreign companies begin to invest more heavily in Burma, transparency and due diligence are essential to prevent further human rights abuses and conflict, and address corruption.** Regulation should provide for thorough human rights due diligence assessments in this area, and companies should be aware of the challenges to conducting sufficient due diligence in the current context –for example, resorting to corporate lawyers for advice on issues such as land acquisition in Burma is often insufficient. The new government should hence develop a national action plan in line with the UN Guiding Principles on Business and Human Rights to ensure the adoption of clear due diligence requirements for businesses operating in Burma.

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| **“The main advice for foreign investors is: don’t rely on the lawyers. Even if the documents say these people signed over the ownership, it can still be dodgy. … You need to do the due diligence to understand why they signed. For example, was it under duress?”[[50]](#footnote-50)****- Vicky Bowman, Director, Myanmar Centre for Responsible Business** |

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